

Discussion: Items C-2-d and C-2-eⁱ

Items C-2-d and C-2-e address similar topics but are distinct. Both concern state policies regarding payment for the provision of waiver services by individuals who are related to the participant (and, in the case of Item C-2-e, a legal guardian of a participant). However, the scope of Item C-2-d is narrow. It solely concerns payment for the provision of *personal care or similar services by legally responsible individuals* (e.g., a parent of minor child or a spouse). The instructions for Item C-2-d below define “personal care or similar services.”

Item C-2-e addresses state policies regarding the payment for the provision of *any type of waiver service* by a relative or legal guardian, including the provision of services other than personal care by legally responsible individuals (keeping in mind that the provision of personal care or similar services by such persons has been addressed in Item C-2-d). In this item, a state specifies whether it permits payments to relatives or legal guardians for waiver services and, if so, any conditions or limitations that the state places on such payments. For example, a state may decide to make payments to relatives or legal guardians only in certain circumstances, for limited periods of time, or permit payment to be made only to specified types of relatives (e.g., relatives who do not reside in the same household as the participant).

It is up to the state to decide whether to provide for either type of payment and, when such payments are made, to specify the circumstances when they are permitted. In the Appendix C-3 service specification template, there are check-offs as to whether the state allows for the provision of a service by a legally responsible individual and/or a relative/legal guardian. The conditions on payment specified in Items C-2-d and C-2-e apply to these check-offs. For example, if a state provides in Item C-2-e that a relative may furnish waiver transportation services only when there is no other provider available, then that condition applies when “relative/legal guardian” is checked as a potential provider of the transportation service in Appendix C-3.

Whenever a legally responsible individual or relative/legal guardian is paid for the provision of a waiver service, the person must meet the provider qualifications that apply to a service and there must be a properly-executed provider agreement. In addition, other requirements such as the proper documentation and monitoring of the provision of services also apply.

Item C-2-d: Provision of Personal Care or Similar Services by Legally Responsible Individuals

Instructions

Select whether the waiver provides for *extraordinary care* payments to legally responsible individuals for the provision of personal care or similar services. If so, specify: (a) the types of legally responsible individual(s) who may be paid to furnish such services and the services they may provide; (b) applicable state policies that specify the circumstances when payment may be authorized for extraordinary care by a legally responsible individual and how the State ensures that the provision of services by a legally responsible individual is in the best interest of the participant; and, (c) the controls that are used to ensure that payments are made only for services rendered.

Technical Guidance

CMS policy is that payments for personal care or similar services delivered by *legally responsible individuals* (as defined in state law but typically the parent of a minor child or a spouse) are not eligible for Federal financial participation. Legally responsible individuals do not include the parent of an adult beneficiary (including a parent who also may be a legal guardian) or other types of relatives, except as provided in state law). 42 CFR §440.167 prohibits FFP for payments to legally responsible individuals for the provision of State plan personal care services. This prohibition is

based on the presumption that legally responsible individuals may not be paid for supports that they are ordinarily obligated to provide. See also Section 4442.3.B.1 of the *State Medicaid Manual*.

Through an HCBS waiver, a state may elect to make payment for personal care or similar services that are rendered by legally responsible individuals when such services are deemed extraordinary care so long as the state specifies satisfactory criteria for authorizing such payments. The criteria must include how the state will distinguish extraordinary from ordinary care. By extraordinary, CMS means care exceeding the range of activities that a legally responsible individual would ordinarily perform in the household on behalf of a person without a disability or chronic illness of the same age, and which are necessary to assure the health and welfare of the participant and avoid institutionalization.

States are not required to, but may also specify other limitations, such as specific circumstances under which legally responsible individuals may be paid providers. Such limitations could include the lack of other providers who are available to serve the participant during periods when the legally responsible individual would otherwise be absent from the home and, thereby, must remain in the home to care for the participant or when the specific needs of the participant can only be met by a legally responsible individual. **In any case, providing for payments to legally responsible individuals is a state option, not a Federal requirement.**

In the context of this item, personal care or similar services mean: (a) personal care (assistance with ADLs or IADLs) whether furnished in the home or the community and however titled by the state in the waiver (e.g., personal assistance, attendant care, etc.) and (b) closely related services such as home health aide, homemaker, chore and companion services.

When a state provides for the payment to legally responsible individuals for extraordinary care, the service must meet all the waiver criteria required when delivered by a customary provider, as well as satisfy some additional protections. The legally responsible individual must meet the provider qualifications (as specified in Appendix C-3) that the state has established for the personal care or similar services for which payment may be made, and the state must conduct monitoring of such services as provided in Appendix D-2, including the required documentation and assurance that the services are delivered in accordance with the service plan. In addition, such arrangements require the proper execution of a provider agreement. State policies should include additional safeguards such as:

- Determining that the provision of personal care or similar services by a legally responsible individual is in the best interests of the waiver participant. A state should consider establishing safeguards when the legally responsible individual has decision-making authority over the selection of providers of waiver services to guard against self-referral.
- Limiting the amount of services that a legally responsible individual may furnish. For example, a state may decide to limit the amount to no more than 40 hours in a week and thereby take into account the amount of care that a legally responsible individual ordinarily would provide. When there is such a limitation, it should be reflected in the limitations section of the service specification in Appendix C-3.
- Implementing payment review procedures to ensure that the services for which payment is made have been rendered in accordance with the service plan and the conditions that the state has placed on the provision of such services.
- Addressing other foreseeable risks that might attend the provision of services by legally responsible individuals.

In addition, states should be aware that unless the waiver uses institutional eligibility rules that disregard the family income of a child waiver participant, paying a legally responsible relative may affect the child's eligibility for Medicaid.

To summarize, when a state provides for payment to legally responsible individuals for the provision of personal care or similar services, the services will be equivalent to services supplied by other types of providers, with some additional protections. The waiver must specify:

- Whether payment is made to the parent(s) of minor children, spouses, or both or other (as defined by state law);
- The waiver personal care or similar services for which payment will be made;
- How the state distinguishes extraordinary care from ordinary care and any limitations of the circumstances under which payment will be authorized;
- Limitations on the amount of services for which payment will be made;
- How it is established that the provision of personal care or similar services by a legally responsible individual is in the best interests of the participant; and,
- How it is determined that payments are made for services rendered.

CMS Review Criteria

When the waiver provides for the payment for personal care or similar services to legally responsible individuals for extraordinary care, the waiver specifies:

- The types of legally responsible individuals to whom payment may be made;
- The waiver personal care or similar services for which payment may be made;
- The method for determining that the amount of personal care or similar services provided by legally responsible individual is "extraordinary care," exceeding the ordinary care that would be provided to a person without a disability of the same age;
- Limitations on the amount of personal care or similar services for which payment may be made;
- How it is established that the provision of personal care or similar services by a legally responsible individual is in the best interests of the participant; and,
- The procedures that are used to ensure that payments are made for services rendered.

Item C-2-e: Other State Policies Concerning Payment for Waiver Services Furnished by Relatives/ Legal Guardians

Instructions

This item concerns state policies regarding payment for waiver services rendered by relatives and/or legal guardians that do not fall within the scope of Item C-2-d. Select whether the state makes payments to relatives or legal guardians for any waiver service (besides personal care furnished by a legally responsible individual as described in C-2-d). If the state makes payments to relatives and/or legal guardians for waiver services, select one of the next three choices and provide the additional information under the selected choice.

Technical Guidance

At the option of the state, waiver services may be provided by a relative and/or legal guardian of the participant. When responding to this item, keep in mind that Item C-2-d addresses extraordinary care payments to legally responsible individuals who furnish personal care or similar services to a waiver participant. **For the purposes of this item, legally responsible individuals are considered**

to be a type of “relative” with respect to payments for the provision of waiver services other than personal care or similar services. When a relative or legal guardian may be paid to provide waiver services, the relative or legal guardian must meet the provider qualifications that have been specified for the service. Services must be monitored as provided in Appendix D-2 and there must be a properly executed provider agreement.

This item presents four response choices as follows:

- **No Payments.** A state may elect not to make payments to relatives or legal guardians for the provision of any waiver services.
- **Specific Circumstances.** A state may elect to pay relatives or legal guardians for the provision of specified waiver services only in *specific circumstances*. Such circumstances must be specified by the state. Specific circumstances might include: (a) the lack of a qualified provider in remote areas of the state; (b) the lack of a qualified provider who can furnish services at necessary times and places; (c) the unique ability of a relative or legal guardian to meet the needs of a person; and/or, (d) other circumstances specified by the state.

When this choice is selected, the waiver must specify the following:

- The types of relatives or legal guardians that may be paid to furnish waiver services. For example, a state may specify that relatives may be paid to furnish services but not legal guardians. The state may specify that only relatives who do not live in the same household as the participant may be paid to furnish services. A state may specify that certain types of relatives may be paid to furnish services (e.g., grandparents of the participant) but others may not (e.g., legally responsible individuals). A state may provide that legally responsible individuals may be paid to furnish services (other than personal care or similar services, which have been addressed in Item C-2-d) that require specialized skills (e.g., nursing or physical therapy), provided that the legally responsible individual is not legally obligated to furnish such services.
- The types of waiver services for which payment may be made to a relative or legal guardian. Non-legally responsible individuals may be permitted to furnish personal care or similar services.
- The specific circumstances when payment may be made to a relative or legal guardian. The waiver also must describe the method for determining when these circumstances apply.
- When payment may be made to a legal guardian, the waiver should include safeguards for determining that the provision of services by a legal guardian are in the best interests of the waiver participant, especially when the legal guardian exercises decision making authority on behalf of the participant in the selection of waiver providers.
- The procedures that are followed to ensure that payment is made only for services rendered, and that services are rendered in the best interest of the individual.

In Appendix C-3, there is the opportunity to select whether a waiver service may be provided by a legally responsible individual or a relative/legal guardian. When this choice has been selected, the selection in Appendix C-3 is qualified by the response to this item (i.e., “relative/legal guardian” means the types that are specified in this item). It is not necessary to repeat the information provided in response to this item in the service specifications.

- **Specific Circumstances Do Not Apply.** A state may provide that relatives or legal guardians are permitted to be paid for rendering waiver services but not limit payment for such services to specific circumstances. That is, provided that the relative otherwise meets the qualifications

to provide a service, the state will make payment to the relative or legal guardian. When this selection is made:

- Specify any limitations on the types of relatives or legal guardians who may furnish services (e.g., whether legally responsible individuals are excluded).
 - In Appendix C-3, for each waiver service that a relative or legal guardian may furnish, check off relative/legal guardian as a provider type. When relative/legal guardian is not checked off in Appendix C-3, the state does not allow relatives or legal guardians to be paid to furnish the service. For example, if this selection has been made in Item C-2-e and transportation is the only service that has been checked off in Appendix C-3, then only the relatives or legal guardians specified here may be paid to furnish transportation and they may not be paid to provide any other waiver services.
 - Specify the procedures that have been established to ensure that payment is made only for services rendered.
- **Other Policy.** Select this choice when either of the foregoing two choices does not accommodate the state's policies. For example, the state may restrict payment for waiver services to specific circumstances in the case of some services or certain types of relatives or legal guardians but not in the case of other services or other types of relatives or legal guardians. When this choice is selected, the information provided in the text field should parallel that required in the foregoing choices, depending on whether specific or extraordinary circumstance are involved.

CMS Review Criteria

When the waiver provides for the payment of services furnished by relatives or legal guardians:

- The types of relatives or legal guardians to whom payment may be made are specified.
- The waiver services for which payment may be made to relatives or legal guardians are specified.
- When relatives or legal guardians may be paid to furnish waiver services only in specific circumstances, the waiver specifies the circumstances and the method of determining that such circumstances apply.
- Limitations on the amount of services that may be furnished by a relative or legal guardian are specified.
- When a legal guardian who exercises decision making authority may be paid to provide waiver services, the waiver specifies how it is established that the provision of services by the guardian are in the best interests of the participant.
- The waiver specifies the procedures that are employed to ensure that payment is made only for services rendered and that services are furnished in the best interest of the individual.